No. 260.

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SUPREME COURT OF THE UNITED STATES

Filed April 16, 1900.

October Term, 1899.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
v.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY,
Defendant in Error.

No. 260.

SUPPLEMENTAL AND REPLY BRIEF

IN BEHALF OF THE COMPLAINANT.

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UNITED STATES OF AMERICA.

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Number 260.

Error to the Supreme Court of the State of Michigan.

SUPPLEMENTAL BRIEF.

Title to Lands Cannot Pass by Estoppel.

In Hayes v. Livingstone, 34 Mich. 384, the supreme court of that state, by Justice Cooley, held: "*Title to land cannot pass by estoppel;* and if the plaintiff claims not the title but the right of *permanent possession, this comes to the same result.*" Citing Nimms v. Sherman, 34 Mich. 45.

And in John Hancock & Co. v. Dix, 114 Mich. 334, in the language of Justice Hooker, the court held "It is well settled in Michigan that titles in land *cannot rest on estoppel in pais.*"

The same doctrine was held in First National Bank of Kalamazoo v. McAllister, 46 Mich. 398, 406.

Shaw v. Chambers, 48 Mich. 355.
Demill v. Moffat, 49 Mich. 126, 132.

This court has held: "the *lex loci* of the state from which the case is removed governs"; therefore these decisions of Michigan are applicable here.

Beecher v. Chesshire R. R. Co. 125 U. S. 555.
Detroit v. Osborn, 135 U. S. 492.

This court has also held: "There can be no estoppel when there is no legal power to do the act, in reference to which it is claimed the estoppel exists; i. e. parting with this land. The officers, directors and agents could not by direct conveyance transfer titles. *Neither can they by acts or omissions.*"

O. R. & N. Co. v. O. R. Co., 130 U. S. 37.
Pa. Ry. Co. v. St. Louis & R. R. Co., 18 U. S. 290, 317.
Thomas v. W. Jersey R. R. Co., 101 U. S. 71 and other authorities cited in the cases just mentioned.

We referred in our first Brief to the fact, that no mine, real estate, franchise, etc., of a Michigan mining corporation, can be conveyed without the vote of *three-fifths of the stock authorizing the same at a meeting called for that purpose.* We add the further case, Beecher v. Marquette & P. R. M. Co., 45 Mich. 103.

See that Brief, pages 21 and 22.

We have also pointed out from the Michigan decisions construing that statute, that the *deed* of a corporation *is not presumptive evidence* of the rightful character of the sale; but it must *affirmatively* appear by other evidence that authority from the stockholders has been granted to the board of directors, in order to make the sale. (See pages 31, 32 and 33 of our first Brief).

It is clear from the decision in those cases, that the Michigan supreme court did not ignore these established doctrines referred to above, as to *estoppel*, and as to conveying property of a mining corporation, and that therefore, it cannot properly be said that

this case was disposed of by that court by estoppel and independent of the federal question involved in the case. That court held as follows:

"Complainant, however, invokes the doctrine that "title to land cannot rest on estoppel on account of the "statute of frauds; and that a vote of three-fifths of "the entire stock of the company is essential under the "statute to convey title. The obvious *reply* to the first "proposition is, that it is also established, that the "statute of frauds does not apply to *boundary lines;* "and that the doctrine of *estoppel* will be applied to "the voluntary adjustment of *disputed boundaries.*

"Hayes v. Livingston, 34 Mich. 384, 397.

"Under the theory of complainant, a corporation "could not settle *boundary* lines without a meeting of "the stockholders called to pass upon the *alienation* of "its land; and the doctrine of *estoppel* could never be "applied to *a boundary line* between corporations, or "between a corporation and an individual. So too, we "*reply* to the second proposition, it may be said that "the statute does *not apply* to the *voluntary adjust-* "*ment of these lines*, but to alienation by deed of con- "veyance. *Complainant was not alienating*, dividing "or selling *any of its real estate*, within the language "of the statute.

"Howell's Annotated Statutes, Sec. 4052.

"Alienation means in law, a *transfer of title* by conveyance.

"Webster's Dictionary.

"Century Dictionary.

"The Cleveland Iron Mining Company, *claimed title "by virtue of the original patent.* Claimant owned *no "specific piece of land north of the section line, even un- "der its own theory, which could be measured by metes and bounds.*"

76 North West Rep. 403.

It will thus be seen, that Justice Grant, in delivering that opinion, did not overrule, or intend to, the established doctrine of Michigan; that there could be *no transfer of real estate by estoppel;* neither did he assert any other doctrine, as to conveyance of corporate property other than by a three-fifths vote of the stockholders; as established by the prior decisions of the court. In fact, he *affirmed* them; and then asserted, as a *reason for his conclusions*, that "*complainant owned no specific* "*piece of land north of the section line, even under its* "*own theory, which could be measured by metes and* "*bounds.*" Thus asserting that his opinion was based upon a determination that the complainant had acquired *no title in fee* to realty in the territory in dispute, to which either the doctrine of estoppel or the statutory provision referred to could apply. Thus, *holding against the title* which the complainant claims through patents from the United States government, acquired in manner alleged in the bill of complaint, and denied in the answers; *raising the federal question now before this court.* The decision of the learned judge in the lower court, when analyzed and cleared of its verbiage is, that the complainant acquired *no title in fee* in any portion of the territory under the former bed of the lake north of the south line of section 10, as claimed; and that "the *only* question involved was "simply the *adjustment of a boundary line,*" viz: where the south line of section 10 projected through the lake would be located.

The question then is whether the title of complainant consisted of a territory of *about thirty acres*, that is definitely surrounded by *courses and distances north of the south line of section 10;* or whether it is the settlement of a *division line* between two owners; there being no dispute as to ownership of the properties to

be separated. This inquiry involves the federal question in this case; and analyzed as Justice Grant has done, in delivering the opinion of the lower court, it is clear that the federal question is the *fundamental* and in fact the *only question* to be arrived at, in settling the controversy, viz: did complainant acquire the title to the thirty acres in dispute; and does it now hold that title through patents from the United States.

II.

Mistake as to title acquired from the United States Government.

There is no dispute that there were misunderstandings among the parties as to the title acquired by patents from the United States government, and that Mr. Kidder, the local superintendent of the complainant company passively recognized for a time the claim of defendants to the disputed thirty acres, on account of the erroneous decision of Clute v. Fisher, 65 Mich. 48; but before that decision, Mr. Kidder for over fifteen years, vigorously denied any rights of defendants to the territory now claimed. (See p. 108-109 of Rec.) And the complainant claiming ownership, erected on this now disputed territory between four and five thousand dollars worth of valuable buildings, in connection with its mining operations (R. p. 85) and occupied them for years; (one a machine shop, and the other a carpenter shop) and without any objection from defendants, until some time after the decision of Clute v. Fisher, 65 Mich. 48.

Justice Grant, in the opinion of the court below,

used the following language: "According to testimony "on the part of the complainant there was a dispute as "to the *boundary line.* Mr. Kidder testified, that the "superintendent of the Cleveland Iron Mining Com- "pany asked him for a deed of the land lying north of "the section line, and that he for his company *declined "to give it, making the same claim that he now asserts.* "If his testimony be true, and for this purpose the "company must stand by its own testimony, *there was "a dispute and it was settled by the agreement.* Complain- "ant recognized it for *nearly five years,* and saw all "these expenditures made by the defendants without "protest."

The learned judge speaks of the territory as *a disputed boundary merely;* that the testimony of Mr. Kidder showed, that there had been a *settlement of boundary.* This the pumping contract, the agreement referred to by Justice Grant, *does not show;* and the evidence of Mr. Kidder is entirely silent as to any such settlement, and none took place. Mr. Kidder's testimony does show that he supposed by the Clute v. Fisher decision the complainant was deprived of its rights, and that on that account for *nearly five years he did not resist* the assertion of rights on the part of the defendants, because of the decision of Clute v. Fisher and until it was overruled by the Michigan supreme court.

In the case of Oregon Railway & Navigation Co. v. Oregonian R'y. Co., 130 U.S. 39, one of the cases cited above, this court held, that a railroad there mentioned was turned over by contract to another company for a period of ninety-nine years; that it was done *without charter or legislative authority;* the court holding: "We think it may be stated as the just result of these cases and on sound principle, that *unless specially authorized*

by its *charter*, or aided by some *legislative action*, a railroad company *cannot*, by lease *or any other contract*, turn over to another company for a long period of time its railroad and all its appurtenances." In that case it was asserted as a defense, that the parties had *entered into a performance of the contract and continued the same for three years;* and that therefore the parties were *estopped* to object to the contract as *executed without authority*. This court held to the contrary, as follows:

"To say that a contract which runs for *ninety-six years*, and which requires of both parties to it continual and actual operations and performances under it, becomes an executed contract by such *performance for less than three years*—is carrying the doctrine much farther than it has ever been carried; and is decidedly a *misnomer*. This *class of cases is not governed by the doctrine of part performance in a suit for specific performance;* nor is this a suit for specific performance. This is an action at law to recover money under a contract which is void, where for nearly *three years* the party acted under it, but in which one of them refuses longer to be bound by its provisions; and the argument now set up is, that because the defendant has paid for all the actual use it made of the road, while engaged in the actual performance of the contract between the dates thus given; it is thereby bound for more than ninety-three years longer by the contract, which was *made without lawful authority by its president and board of directors*. We consider this proposition, as needing *no further consideration except a reference to the discussion of the same subject.* in Thomas v. W. Jersey R. R. Co., and Pa. R. R. Co. v. St. L. A. & T. H. R. Co., already cited."

So we say in the case at bar, that the same doctrine

applies when defendants claim, and the court below held, that because for *nearly five years* the superintendent of complainant, under a mistake recognized defendants in possession of the disputed territory which they held without right; and we assert that the lapse of such time under such mistake as to ownership, and of the short time taken in which to investigate the matter after discovering the mistake, to-wit, four or five months, cannot possibly operate to take from complainant the legal title to a mine, consisting of *thirty acres* of great value, a mine discovered by complainant. There is no equity in such claim, for, as we have specifically pointed out in our original brief, the defendant The Cleveland Iron Mining Company has reaped a profit over all disbursements of over $100,000 from the mistaken occupation. And the defendant The Lake Superior Iron Company, will suffer no loss when repaid the small expense for diamond drilling and interest thereon, which the complainant specifically offers in its brief to pay, and consents that this obligation be made a condition of the decree in complainant's favor.

(See pages 105 to 110 of our original brief.)

III.

What is a division line that may be acquiesced in without action of stockholders, and by estoppel.

As we have pointed out, Justice Grant in delivering the opinion of the court below, held that the statute against transferring title by estoppel and the statute

against conveyance of corporate property without action of stockholders, did not apply in this case, because it involved simply the settlement of a *dividing line, or disputed boundary line.* Citing Joyce v. Williams, 26 Mich. 332; Smith v. Hamilton, 20 Mich. 433; Jones v. Pashby, 67 Mich. 459.

See 67 N. W. Rep. 459.

And the learned justice held as follows: "The rule "is settled by the decisions of this court, that where "disputed boundary lines have been established by ex- "press agreement, or under such circumstances that "an agreement will be implied, and parties have for "any considerable time recognized them, they would "be upheld, though title by adverse possession could "not be maintained"; referring to the cases just cited "above.

This holding of the learned judge *should be considered together* with a further explanation of his meaning, in the opinion just below the above quotation, as follows: "*Complainant owns no specific piece of land north "of the section line*, even under its own theory, which "could be measured *by metes and bounds.* How much "if any it owned, could only be determined by agree- "ment, or the decree of a court of equity. If it sur- "rendered land north of the line, it gained other on "the south. *There was no such alienation of land, as "required the vote of the stockholders.*" Thus we see that in these holdings the learned judge had in mind simply the settlement of a *boundary line, a division line;* and he so held upon the hypothesis as we have asserted, that "the complainant *owned no specific piece of land north of the section line, which could be measured by metes and bounds;*" and that the inquirywas simply a determination of where the south line of section 10 was located, as the boundary between ownership in

the land under the lake. Built upon this erroneous hypothesis, which is *a denial of the rights of complainant acquired under the laws of the United States, which involves the federal question here under consideration*, the learned judge in the court below treats the whole inquiry as but the settling of dividing lines, and determines the entire case upon that basis; expressly holding, that the doctrine of *estoppel* forbidding the transfer of realty by estoppel does not apply; because "complainant owned *no specific piece of land north of the section line which could be measured by metes and bounds*," and that the statute against alienation without a vote of the stockholders does not apply, for the same reason. The court then further considering the pumping contract, in that connection, uses the following language: "It was executed with all the formalities of a deed; it had the seal of the corporation; complainant as well as defendants paid out large sums of money under it. All are now estopped to deny its due execution and validity." There is much confusion of ideas in this last quotation from the opinion of the learned judge. As we have pointed out, he held as appears above that the statute of frauds does not apply because there is no title being transferred; because complainant *had none north of the south line of section 10*, and at the same time conceding that title to land cannot be transferred by estoppel under the laws of Michigan; and then the learned judge uses the unexplainable language, inconsistent with his holding, that the pumping contract "was executed with all the formalities of a deed; it had the seal of the corporation; complainant as well as defendants paid out large sums of money under it. *All are now estopped to deny* its due execution and validity." Such holding, if meaning simply what he had just

held, that the "complainant *owned no piece of land north of the south line of section 10, which could be measured by metes and bounds*," then it would be consistent; but not if applied to the claim of complainant, that it acquired through patents from the United States thirty acres of land north of that south line of section 10 which defendants now claim to own, and assert adverse title to. The opinion of the learned judge quoted from on these points is confusing, but serves to point out how impossible it is to deprive a mining corporation, or in fact any other owner, of his title to land by a theory of estoppel; and how difficult to deprive a mining corporation of its mining lands and franchise without the assent by three-fifths vote of all the stockholders consenting thereto. That nothing can be done except possibly the settlement of disputed dividing lines. Referring to the cases cited by Justice Grant—Jones v. Pashby, 67 Mich. 459; opinion of the court delivered by Justice Morse. There it was held, "Where parties by mutual agreement, and for that express purpose, meet and fix a *boundary line*, and thereafter acquiesce in the line so established *between* them, *such line* will be considered the *true division line*, notwithstanding the period of such acquiescence falls short of the time fixed by the *statutes of limitations* for gaining title by adverse possession."

And on page 462 of the same opinion, Justice Morse states the facts as follows: "In this case the *deeds* were so ambiguous as to require their *meaning to be settled in this court as to where the division line would run between the parcels conveyed and divided thereby.*"

Thus, the question determined was, what the *deeds fixed* as the proper line; not the question of the power to convey property by estoppel—the deeds had already been made.

In the case of Smith v. Hamilton, 20 Mich. 438, cited by Chief Justice Campbell, delivering the opinion of the court, held, "Where the transaction *has not been*, such as to *amount merely to an honest intent to determine a doubtful line*, the authorities have *not* permitted an agreement to stand which would operate as a violation of the statute of frauds; but where the parties have *only tried to find the true boundary*, it has been held that the statute was not infringed, and the line was fixed by acquiescence." Thus, affirming that where there was any real dispute of ownership, it would make void the statute to enforce it; but where the parties have only tried to fix the true boundary line, it would not be infringed; that is not the case at bar.

In the case of Joyce v. Williams, 26 Mich. 332, also cited, it was held: "Where two parties who have together purchased a lot, procure the same to be surveyed for the purpose of establishing the boundaries of the lot and of *dividing* the same in *halves*, and thus make a practical and actual division of it, and both occupy and make improvements upon their respective halves, with reference to such division, a long acquiescence in such division line, though not sufficient to create a bar under the statute of limitations will work an estoppel." This was simply the establishment of a *division line*, and not the *transfer* of title by *metes and bounds as in this case.*

The territory claimed by complainant, as its riparian ownership under Lake Angeline, as appears in Exhibit A to the bill of complaint, page 14 of the record, consists of two triangles, each resting upon the south line of section 10 as a base, and surrounded by said south line of section 10, and lines extended from meander corners 13, 14, 15 and 16 to the center of the

lake; or to a point claimed by complainant to be the center—a point the exact location of which is to be determined by adjudication of the court; *which inquiry involves the federal question as its basis.*

We submit that the holding of the learned judge delivering the opinion of the court below, is not well founded when asserting that "*complainant owned no specific piece of land north of the south line of section 10;* and when holding that the controversy was simply the settlement of a boundary line. We submit that as an underlying principle of inquiry in this case, and in all the determinations of the court below, there appears the inquiry, did the complainant own, and does the complainant now own, a portion of this territory north of the south line of section 10 by virtue of its patent rights acquired from the United States government. This is the federal question in this case; and all determinations made by the court below rest upon that inquiry. A claim asserted by complainant, and denied by the defendants. Thus, all questions now for the consideration of this court, rest upon and are subservient to the *federal question;* and there is no question here independent of it, that can dispose of this case without dealing with and disposing of that question.

IV.

Pumping Contract.

Defendants' counsel have construed the contract of the 17th of March, 1892, as amounting to a conveyance to them of the thirty acres in question. That is, they assert at least in their arguments that they acquired title by virtue of their patents to the south line of

section 10; that this pumping contract is a *conveyance* to them of complainant's rights thereto. The complainant acquired title from the government to about thirty acres of land under the bed of the lake, by virtue of patents from the government. There is no element of *conveyance* in the contract; it is simply an agreement for the pumping of the lake, in which complainant and defendants are to join in the expense and in which complainant agrees, as a part of its duty, to maintain and keep in repair a certain flume which it is to construct, and which it is to maintain and keep in repair and in successful operation "until the iron ore to which said third party is entitled lying on, in or under the portion of the bed of said lake lying south of the south line of said section is mined and exhausted and then to turn over said flume in good repair to first and second parties hereto without charge and to allow them to operate and maintain the same for the purpose of continuing said drainage, giving the employes of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, etc.

(See pages 90 and 91 of Record).

There is not one word in the paper bearing the semblance of a conveyance of the territory under consideration—it simply contains the suggestion of a *mistake* in statement as to *when* the ore should become exhausted, plaintiff should cease to be required to maintain the flume, and *when* defendants should have the right so to do. The idea that this paper, (even if there had been authority in the employes of the company to make a conveyance of the territory) is a conveyance in any form, is simply absurd; and its examination points out forcibly to what extremity defendants are driven, in asserting ownership to this large and valuable min-

ing territory which they do not own and never have owned, but which came to the complainant through patents from the United States government.

The learned judge in the court below holds, referring to this contract, as follows: "If set aside, the contract is at an end, and the lake *must be left to fill up*, if either refuses to *enter into a new contract*". We ask, why so? It is a contract for the pumping of the lake, *and that only:* there is no prayer in the bill in this case to set aside the contract. Neither is there any suggestion in the contract or bill of complaint that complainant can cease to pay its proportion of drainage expenses until its ore shall become exhausted; and there is no evidence of its exhaustion as yet; or when it will become exhausted. What complainant is asking for in this court is, that the defendants be restrained from interfering with the property owned by it; formerly covered by the waters of the inland lake, and from removing or attempting to remove or interfering with the iron ore in and under the territory described. And that the court decree a designation of territory owned by complainant by lines that shall equitably locate said territory. And also decree that the complainant is the owner of the territory abutting lots 2, 3, 4 and 5 of section 15, within the boundary lines set forth and claimed, and that the claims and assertions of defendants as to ownership of said territory so specifically referred to are void, and without force; and do not constitute a cloud upon complainant's title thereto, etc.

(See page 13 of Record).

There is no foundation for saying that the pumping contract should be terminated by the decree of the complainant, as prayed for. It would certainly eliminate the many assertions of ownership of the territory in dispute made by defendants; but it could not ter-

minate the pumping contract as it is not a conveyance of the territory in question; either legal or equitable. It shows for itself and by the testimony of Mr. Kidder the local agent of complainant, who negotiate the making of that contract, that he had no such idea in its framing, as conveying any rights which his company might have, as he knew he had no authority to do so.

V.

Complainant's Exhibit F.

Mining engineer Bradt describes minutely the division of Lake Angeline, which consists of 148.60 acres, into three parts, between complainant and each of the defendants, in proportion to the shore frontage shown by the meander of the government. This appears from the maps and field notes of the U. S. Land Office, which are upon pages 34 to 37 of record; and also by the testimony of Mr. Bradt on pages 36 to 43 of record. Complainant's Exhibit F, page 41 of the record, covers what is contained in complainant's Exhibit A, attached to the bill of complaint (which shows only the meander lines of the lake, and the division of the lake by convergent lines to the center) and designates the territory of complainant under the lake by courses and distances marked thereon (see page 14 of Rec.) In addition to what appears in Exhibit A of the bill of complainant referred to, complainant's Exhibit F, page 41 of the record, has the computations of engineer Bradt, as to the relative acreages owned by each party, location of mining work, railroad, etc. Taking Bradt's testimony from page 36 to 43, it clearly marks out how accurately and equit-

ably the lake can be divided by convergent lines to a center. By these lines The Cleveland Iron Mining Co. is shown to have a frontage of 107.55 chains and an acreage of 69.58 acres; The Lake Superior Iron Company a frontage of 56.58 chains and 35.20 acres; and The Pittsburgh & Lake Angeline Co. 68.15 chains, 43.83 acres, as marked on the northeast corner of complainant's map, Exhibit F. The relative shares are stated in the evidence by the witness Bradt, on pages 39 to 41 of the record. We are not strenuous as to this precise mode of dividing the lake among abutting owners: if the defendants are able to point out to the court a more equitable method of apportionment. We simply insist, that in the most equitable manner, according to the judgment of the court, the territory under the lake is to be apportioned among the abutting owners according to their relative shore frontage. And the authorities which we cite sustain the position, that this should be by convergent lines to a common center. Counsel for The Cleveland Iron Mining Co. insist, that under our mode of partitioning the lake, it would be entitled to a portion of the small arm that extends southeasterly below what would be the south line of section 10 if projected east and west through the lake; and insist that as it appears that the complainant has mined ore in that territory which it claims under this arm of the lake, that there is no method of determining the amount of ore that has been mined; and therefore, equity could not be arrived at in an accounting for ore taken by complainant, as well as by defendants. This is shown to be fallacious by the cross-examination of Mr. Bradt by Mr. Hayden, counsel for defendant, The Cleveland Iron Mining Company (see pages 53 to 57 of Rec.) Mr. Hayden inquired of the witness Bradt, as to the extent of mining

conducted at that point, and as to the amount of ore removed. To which the witness answered that the ore was removed *down to the second ore level, 209 feet below the surface;* that it was first class ore, best grade; that he could not state the number of tons; that he *has maps of the territory, and can produce them.* (See pp. 53 and 54 of Rec.)

The same witness further testified, that *he could estimate closely the ore taken out,* from the maps, showing *the plan of the workings;* that they had mined out *two levels* when the work was abandoned there; that there was ore below those levels. (See p. 56 of Rec.)

So, with maps of the workings, only two levels having been mined out, maps showing the levels, there would be no difficulty in coming very closely to the tonnage of the ore mined in that locality, if necessary to do so, for an equitable accounting between the parties. The space there which defendant Cleveland Iron Mining Co. would be entitled to, if any, is very small, and but a mite, in proportion to the mining which it has done upon the territory of the complainant now in dispute.

On a decree for complainant, the case could be referred to a Master to take proofs as to an equitable adjustment between the parties with regard to ore mined. So far as appears upon this record, it is shown, that during the years 1895 and 1896, the two first years that the defendant Cleveland Iron Mining Co. mined on this territory of complainant, it cleared a profit from the ore there mined, of over $100,000; the particulars of which we point out in our first brief, summarized on pages 106 and 107.

VI.

Defendants Without Equity When Claiming the Land in Question.

We have demonstrated,

FIRST.—That complainant acquired title to the territory in dispute through patents from the government, and mesne conveyances to it, as riparian rights appurtenant to its shore frontage.

SECOND.—We have demonstrated, that the lands have never been conveyed by the corporation, and that the stockholders of the company never authorized any transfer of such real estate.

THIRD.—We have also demonstrated, that in Michigan, real estate cannot be directly or indirectly transferred, or title taken away, by estoppel.

FOURTH.—We have demonstrated, that the disputed territory is about thirty acres, surrounded by courses and distances, and must of necessity be of irregular form, no matter how located.

FIFTH.—We have conclusively pointed out, that the learned judge delivering the opinion of the court below, in this case, held, that the complainant acquired *no title to any land north of the section line* which could be measured by *metes and bounds;* and that based upon that denial of complainant's rights acquired under the government, the learned judge held, *that the doctrine of estoppel did not apply* to the case, and that the doctrine which forbids alienation of corporate property without a three-fifths vote of the stockholders, does not apply (76 Northwest Rep. 403); and based his adjudication upon the assertion that complainant had

not acquired any title north of that section line; and he held that the only dispute that existed between the parties was, where that *line lay between the property* which it did acquire and that which it did not acquire. Thus resting his entire decision upon the denial of the rights which complainant asserts, it acquired through patents from the government north of the south line of section ten, and which *involves the federal question before this court.* If complainant acquired title to this land under the lake as riparian owner, how has it lost it? It has not conveyed it away. It is not estopped because its agent simply supposed for about five years, after asserting notoriously the ownership of the territory in dispute for about 20 years, that by the decision of Clute v. Fisher, 64 Mich., a mode of division of the lake had been established which deprived complainant of ownership. (And as stated above, the court below held estoppel did not apply.) That court held the ruling in Clute v. Fisher erroneous, and affirmed the doctrine of ownership for which we now contend.

We ask then, was the complainant deprived of its title by the confessed erroneous holding by the supreme court of Michigan, which it subsequently confessed and corrected in Ice & Coal Co. v. Ice & Coal Co., 102 Mich.? We submit, to claim such to be the case is absurd. Real estate titles do not stand upon such fickle basis, and the rights of stockholders in mining corporations cannot be frittered away by any such theory.

VII.

Claim of Counsel For Defendant The Lake Superior Iron Company, as to Jurisdiction.

Counsel for the defendant the Lake Superior Iron Company, assert in their brief, pages 19 and 20, as follows: "In this connection we call attention to the *entire want of anything contained in the complainant's bill, constituting a claim of any title, right, privilege* or *immunity* under the constitution, or any treaty, or statute, or commission held or authority exercised under the United States. That it is *not only true*, that complainant *did not claim*, that the *patents of the United States conveyed any title, or interest in the lake bed; but it expressly claimed and asserted by the bill, that the land conveyed by the patents was limited to the area outside of the shore line;* and that the rights of the abutting owners in the lake bed, were conferred *not by patent*, but by the rules of the common law as the same were in force in the State of Michigan."

This is an erroneous statement, as will be seen by an examination of the bill.

Paragraphs 1 and 2 allege specifically; that the title acquired by the defendant The Lake Superior Iron Company was *through a patent* to Briggs, of the acreage contained in the upland abutting on the inland lake, and mesne conveyances to that defendant. That the land so conveyed was as described in the records of, and on the maps in the office of the surveyor general of the United States, and in the record and on the maps in the local U. S. land office at Marquette, Mich. —That said lands contained 112.21 acres, according to the official plat of the township (see page 1 of record.)

It is an established fact, that the United States government, in selling fractional subdivisions of land, abutting on lakes or rivers, in fixing the price to be paid therefor, require *payment only* for the acreage contained in the fractional subdivisions of the *upland* bordering on the water; and the acreage is thus definitely established by the surveyor general, from surveys made under his direction, to determine the amount to be paid for such land. It is also *thoroughly established, that the title to the inland water* and the land thereunder *to the center* of the lake, or the thread of the stream, passes to the purchaser of the abutting land, from the government, by virtue of the purchase of such fractional subdivisions. By this rule, the acreage specifically paid for by Briggs, the patentee, in that instance, was 112.20 acres; but he acquired by virtue of the U. S. patent the *riparian* rights opposite this land, viz.: ownership to the center of the lake. The United States authorities cited in our briefs, fully sustain this claim. The title conveyed by him to the defendant the Lake Superior Iron Company included the *riparian right* to the center of the lake opposite those fractional descriptions.

Paragraphs three and four of the bill allege that the patent from the government to Burnell conveyed the fractional portions in the east half of section 10, and in the fractional west half of section 11, township 47 north, range 27 west, amounting to 555.15 acres (See page 3 of record). By examination of the government maps on pages 34, 35 and 36 of the record, it will be seen that 555.15 acres was the total acreage of the upland. The United States government received only pay for the upland, but it conveyed the *riparian* ownership in and under the waters of the lake (see pages 3, 4 and 5 of record).

Paragraph 5 of the bill, which includes paragraph 6 of the bill as filed, specifically describes patents to Burt, Pettit and others, for lots 2, 3, 4 and 5; and how they passed by mesne conveyance from them to the complainant; and alleges that said fractional subdivisions known as lots 2, 3, 4 and 5 of section 15, in township 47 north, range 27 west, designated the acreage of the upland abutting on the lake to be paid for as 140.85 acres, which also conveyed all riparian rights in the abutting inland lake.

Complainant there alleges, that it has been the owner of lot 2 of said section and in possession of the same since the year 1864, and that these fractional lots referred to, as vested in it and defendants constitute the *entire* territory fronting on this inland lake, known and described as Lake Angeline. And that all of the fractional government descriptions of land, fronting on this lake, are owned by the complainant or the defendants, according to the specific interests of each in the frontage. Complainant further alleges that the abutting owners upon said inland lake are *owners of the land and minerals under said lake*, according to the amount of frontage land upon said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake. Thus alleging the purchase of all the fractional description surrounding the entire lake, by complainant and defendants, from the United States, through patents from the government, and mesne conveyances to them, by virtue of which they acquired the *riparian ownership of the entire lake.*

Paragraph 7 of the bill sets forth the field notes of the United States government, describing the courses and distances of the meander line, surrounding this inland lake, and locating them upon the map (see pp. 9 and 10 of Record).

Complainant in paragraph 7 alleges that the territory covered by the lake belonged to it by virtue of its ownership of lots 2, 3, 4 and 5 of section 15, bordering upon the shore of the lake, designated by courses and distances from the surveys of the government appearing upon its maps, and from the meander courses and distances of the riparian territory owned by it.

(See pp. 10 and 11 of Record).

Having thus described complainant's rights, in this territory, the bill alleges as follows: "And your "orator alleges, that *it owns said territory formerly un-* "*der the waters of said inland lake, by virtue of its* "*riparian ownership as abutting owner upon the south* "*side of said inland lake under the laws of property* "*ownership*, established by the decisions of the courts "of the State of Michigan, *and of the United States*, as "well as other states and countries; and that it has "ever been the owner thereof *since its purchase of said* "*lots 2, 3, 4 and 5 of said section 15, as previously set* "*forth* (see p. 11 of Record).

In this same paragraph complainant further alleges, "And your orator alleges, that it and the said defend- "ants *are the owners of the entire territory formerly* "*covered by the water of the said inland lake known as* "*Lake Angeline;* and that the exact boundary lines of "ownership, have never been *established and fixed* be- "tween your orator and the said defendants; and that "your orator desires that the same may be fixed and "established by the decree of this honorable court, in "accordance with the principles of law and equity" (see pp. 11 and 12 of Record).

Thus, complainant alleges ownership to the center of the lake, by virtue of riparian rights acquired from the U. S. government, through its patents; rights acquired appurtenant to the conveyance *under the laws of the United States.*

Complainant asks that the territory under this lake be apportioned to the three parties owning the entire surrounding and all of the riparian rights there, according to the amount of shore frontage owned by each.

That equity should thus apportion such rights, is fully sustained in

Lincoln v. Davis, 53 Mich. 390.
Jones v. Lee, 77 Mich. 40.
Ice & Coal Co. v. Ice & Coal Co., 102 Mich. 237.
Hardin & Jordan, 140 U. S. 402.

We have specifically referred to these decisions, and quoted from them, on pages 14, 15 and 16 of our original brief.

In paragraph 8 of the bill, complainant alleges that the Lake Superior Iron Company asserts ownership to a large portion of its said territory covered by the waters of Lake Angeline, to-wit: "All of said inland lake lying west of the north and south center line of said section 10, and north of the section line between said sections 10 and 15, if projected east and west through the said inland lake", etc.; and that the Cleveland Iron Mining Company "claims to be the owner of the territory of your orator above described, as owned by your orator, formerly covered by the waters of said inland lake, lying east of the center line of said section 10 and north of the south line of said section 10, projected through the territory previously covered by the waters of said Lake Angeline * * That the said claims * * constitute a cloud upon your orator's said title, and apparent encumbrance thereon" (see pp. 12 and 13 of the bill).

Thus, there is alleged by the complainant, in the most positive form, *title acquired from the U. S. government to lots 2, 3, 4 and 5 of section 15, and to the riparian rights in the inland lake in question abutting*

those lots to its center. The assertion in opposing counsel's brief, that there is an "*entire want of anything contained in the complainant's bill, constituting a claim of any title, right, privilege or immunity under the constitution, or any treaty, or statute, or commission held* or authority exercised under the United States", *is not true.*

In Cohens v. Virginia, 6 Wheat. 264, 379, this court held, "A *federal question is presented, when there is in-* "*volved a controversy as to riparian rights, acquired un-* "*der the laws of the United States*".

In the case of Shively v. Bowlby, 152 U. S. 10, this court held, as to *riparian* rights: "This is a *direct ad-* "*judication against the validity of a right or privilege* "*claimed under the laws of the United States, and pre-* "*sents a federal question within the appellate jurisdic-* "*tion of this court.*"

These cases referred to, and others, are cited in our first brief on this hearing, from pages 14 to 20.

In the case of Green Bay & M. Canal Co. v. Patent Paper Co., 19 Supreme Court Rep. 100, this court held, "No *particular* form of words or phrases has ever been "declared necessary, *in which the claim of federal* "*rights must be asserted. It is sufficient if it appears* "*from the record that such rights were specifically set up* "*or claimed in the state court, in such manner as to* "*bring it to the attention of that court.* The true and "rational rule, this court said in Bridge Proprietors v. "Hoboken Co., 1 Wall. 143, is, that the court must be "able to see clearly, *from the whole record*, that a cer- "tain provision of the constitution, or act of congress, "*was relied on* by the party who brings the writ of "error, and that the right *thus claimed by him was* "*denied*".

And other cases cited in our brief in resisting motion to dismiss the writ, pages 39 to 42, and 10 to 13.

Complainant having thus specifically alleged ownership to the center of the lake under riparian rights, acquired by virtue of patents from the government and mesne conveyances to it, the defendant The Cleveland Iron Mining Company alleges, that it owns the territory in dispute to the south line of section 10, if projected east and west through the lake, and its allegation is as follows: "It was the intention of the "government to convey to said Lorenzo D. Burnell "the *entire east half of section 10, and the entire west "half of section 11*, described in the bill, to the full "extent and limits of the section line of said section, "as bounded on the west by the north and south center "line of section 10, and on the east by the north and "south center line of section 11, and on the south by "the south line of sections 10 and 11, *regardless of the "meander lines of said Lake Angeline.* That it was "the intention of both the government and the grantee, "under and by virtue of the terms of said patent, that "the patentee should have *the full limit of said two "half sections as aforesaid*," etc.

Thus, the federal question is presented by the complainant asserting ownership to the center of the lake by virtue of patents from the government, and riparian rights thereunder; and the assertion on the part of The Cleveland Iron Mining Company of ownership to the south line of section 10 referred to, each claiming the *same territory*, consisting of about 30 acres of land under the inland lake. These conflicting claims, asserted under the laws of the United States, thus presented a federal question. The supreme court of Michigan passed directly upon that issue, as follows: "The Cleveland Iron Mining Company claimed title *by*

"*virtue of the original patent.* Complainant *owned no* "*specific piece* of land north of the section line, even "under its own theory, which could be measured by "metes and bounds. How much, if any, it owned "could only be determined by agreement or the decree "of a court of equity."

Defendant The Lake Superior Iron Company also asserted ownership to the south line of section 10, and all west of the north and south center line of 10, as above referred to, raising the same issue. The lower court also holding its claim to be correct.

Notwithstanding the issue thus clearly presented upon the record by the pleadings, and the clear determination of this federal question by the lower court, counsel for The Lake Superior Iron Company, in their brief filed in this court, on page 21 assert that we claimed in the court below that the patents of the United States did not purport to convey, and did not convey, any of the land or bed of the lake covered by the water, but conveyed only the upland as claimed by them, only such as lay outside of the meander lines. And on page 25 of said counsel's brief they assert "The *only claim* made in the state court, by the plain- "tiff in error, through patents from the United States "government, was this, viz: that under such patents "it obtained ownership to the lands *bordering on the* "*lake*", etc.

We asserted in most positive manner, in the court below, the ownership of complainant to the center of the lake, *by virtue of patents from the government*, and quoted the *same* authorities, appearing in paragraph 4 of our first brief filed in this court on this hearing, to which we now refer; and we have pointed out in both briefs, the facts, as stated by this court in St. Paul and Pacific Railway Company et. al., v. Schurmeier, 7

Wall. 272, and in Hardin v. Jordan, 140 U. S. 402, and other cases, that "It has been the practice of the gov-"ernment from its origin, in disposing of the public "lands, *to measure the price to be paid for them, by the "quantity of upland granted; no charge being made for "the lands under the bed of a stream, or other body of "water.* The meander lines running along or near "the margin of such waters are run *for the purpose* of "ascertaining the exact quantity of the upland to be "*charged for and not for the purpose of limiting the "title of the grantee to such meander lines.*"

Also holding, "That the beds of streams above the "flow of tide, whether actually navigable or not, *be-"longed to the proprietors of the adjoining lands.* St. "Paul v. Ritz, 138 U. S. 226." Also holding, "The "disposal of the present case, therefore, seems to us to "require no further discussion; *only an answer to the "single question—what is the common law in regard to "title to fresh water lakes and ponds? And on this sub-"ject we think there can be very little difference of "opinion.* Of course, as already stated, there is no "question where the land fronts upon a fresh water "stream or river. In such case the law is perfectly "plain. Sir Mathew Hale states 'Fresh rivers of what "kind soever, *do of common right belong to the owners "of the soil adjacent*, so the owners of the one side have "a common right to the property and soil, and conse-"quently of the right of fishing usque ad filium aquæ; "and the owners on the other side, the right to soil "and fishing, filium aquæ on their side.' "

These principles we asserted in the lower court, as now in this, and the issue upon the record, *by the pleadings*, is beyond question.

In the brief of counsel for the Lake Superior Iron Company, it further asserts, that the position taken by

us in the court below was "that such title was not con-"veyed by the patent of the United States government; "that the conveyance in the patent was *limited* to the "shores of the lake, as defined by the meander lines of "of the government survey". Speaking upon this point, the brief says, page 6. "Further, the drafting of "a patent and signing the same by the president, that "proposed to convey any portion of an inland lake "would be a nullity, as neither the president nor the "draftsman had any authority to convey more acreage "than the fractional lots consisting of the upland out-"side of the meander lines of the lake. It has been so "held by the supreme court of the United States", etc. (See pp. 35 and 36 of said defendant's brief).

What we asserted in the lower court, as to convey-ance from the government, appears in paragraph 2, be-tween pages 19 and 32 inclusive of the brief in that court; where we assert, as in our first brief in this court, in paragraph 4, pages 34 to 46; that the govern-ment officials could not, in making the patent, ignore the established rules, that the conveyance should be of acreage *contained in the upland*, and that when in the patent to Burnell, through which the Cleveland Iron Mining Company claim in this case, a part of the de-scription was, "The east half of section 10, and the "west half of section 11, township 47 N., range 27 W., "containing 555.15 acres, according to the official plat "of the United States government" (see p. 33 of Record), and when it appears by the government maps offered in evidence; as well as by the meander lines of the government of the lake in question (see pp. 34 and 36 of Record), that the upland in the east half of section 10 and the west half of section 11; as marked by the surveyors of the government upon the government maps in acreage amounts to 515.15 acres; the amount

stated in the patent, that the amount of acreage as stated was the amount for which payment was to be made, and the amount *specifically designated*, and that the balance of the territory that would have been contained in the east half of 10 and the west half of 11, had there been no lake there, became vested in the abutting owners, *under the law of the United States as to the riparian rights, passing to abutting owners in proportion to their abutting frontage;* and we cited in the court below, on page 33 of that brief, Hardin v. Jordan, 140 U. S. 402, where the following is held:

"The land department *has no jurisdiction* to transfer lands which are not at the time public property. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them *by the quantity of upland granted; no charge being made for the lands under the bed of a stream or other body of water.* The meander lines running along or near the margin of such water are run for the purpose of ascertaining the exact quantity of the upland to be charged for, *and not for the purpose of limiting the title of the grantee to such meander lines.* It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered.

We also quoted as the law from this court, the case of St. Paul & P. R. R. Co. v. Schurmeir, 74 U. S. (7 Wall.)272. Opinion by Justice Clifford, as follows: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, *not as boundaries of a tract, but for the purpose of defining the sinuosities of the banks of a stream, and as the means of ascertaining the quantity of land in a fraction* subject to sale, which is to be paid for by the purchaser.

"In preparing the official plat from the field notes the meander line is represented as the border line of a stream, and shows to a demonstration that the water course and not the meander line as actually run on the land, is the boundary. *It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can afterwards be granted out, to the injury of the original grantees.*"

We also cited from Barney v. Keokuk, 94 U. S. 342, Packard v. Bird, 137 U. S. 661, as well as from Hardin v. Jordan, 140 U. S. 402, that the shore between high and low water marks, as well as the bed of the river, belonged to the proprietors of the adjoining lands. St. Paul v. Ritz, 138 U. S. 206, approved in Hardin v. Jordan, 140 U. S. 402.

We also, in the court below, quoted authorities holding as follows: "The *registers of local land offices are "mere sales agents for the government.* The survey and "division of the lands are entrusted to the surveyors. "Their action is *conclusive*, and the registers *are bound "to sell* by the plats furnished them. They can sell in "no other way." Citing,

Kissell v. St. Louis Public School, 18 How. 19.
Bagnell v. Broderick, 13 Peters, 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Phillips, 20 How. 372.

(See pages 19 to 25 inclusive of brief in lower court, if this court considers that such brief has anything to do with this case.)

Our position has been from the start in this case, that whoever owned the fractional subdivisions of land surveyed by the United States government, acquired through the government, are owners of the riparian rights in the inland lake to its center, or to the thread

of a stream if abutting upon an un-navigable stream; and that if the United States government owned the land *until it patented it*, it would convey that title *to the center* of the lake, or to the thread of a stream, as would also a private individual conveying it subsequently, after acquiring it; and we insisted in the lower court that when in the patent to The Cleveland Iron Mining Company, the conveyance was of the *east half of 10* and the *west half of 11, limited* to the acreage, 555.15 acres, instead of 640; that the controlling provision of the patent, under the rules of the government surveys referred to, conveyed specifically as land, only 555.15 acres, the fractional subdivisions, and that the amount of ownership in the lake, which passed to Burnell and through Burnell to The Cleveland Iron Mining Company under the patent, was *only that portion* of the lake which would be a *riparian right appurtenant to the frontage acquired by it;* and that to the center of the lake only, and not to the south line of section 10, if projected through the lake as claimed by defendant Cleveland Iron Mining Company. But, supposing in our argument in the court below, we had stated some erroneous legal propositions in the oral discussion, or in this brief, what has that to do with the inquiry here? As this court has said, in the cases sighted above, the inquiry is, whether *by the pleadings* there was presented upon the *record*, an issue which involved a federal question, and the determination of which, must of a necessity adjudicate and determine such federal questions—such as, what title was acquired under the laws of the United States and what not; and whether the riparian rights passed by virtue of United States patents to complainant or to defendants; and what was the extent of the acquisition of riparian rights of each party appurtenant to convey-

ances by the government. These inquiries as we have said are expressly held in Cohens v. Virginia, 6 Wheat. 664, 379, and in Shively v. Bowlby, 152 U. S. 10, and other cases cited, *to be federal questions*, and when involved in the inquiry in the court below, entitle the parties to a writ of error to this court.

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